ORIGINAL

RECEIVED
JUN 29 1992
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
	)	
Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 gHz Bands	)	PR Docket No. 92-80
	)	RM 7909
	)	

Before the: Commission

ORIGINAL
FILE

COMMENTS OF MITCHELL COMMUNICATIONS CORPORATION

1. Mitchell Communications Corporation ("Mitchell") is a "Wireless Cable" operator with systems both on the air and under construction in cities around the country. Mitchell is also an applicant for H-Group Operational Fixed Service (OFS), Multipoint Distribution Service (MDS), and Multichannel Multipoint Distribution Service (MMDS) channels in several locations, leases channels in each of these services from other Commission licenses and leases excess air time from several Instructional Television Fixed Service (ITFS) licensees. Based on its experience in the wireless cable industry, Mitchell respectfully submits the following comments on the above captioned Notice of Proposed Rulemaking.

2. Mitchell Communications Corporation agrees with the Commission that there is a need to re-organize the regulation of wireless cable television if it is to ever realize its competitive potential. We believe that FCC regulatory modifications can help create a more competitive marketplace in what has become dominated by an unregulated monopolistic utility; Cable-TV.

No. of Copies rec'd 0+
List A B C D E

3. MCC believes that application processing can be significantly accelerated if the Private Radio Bureau's Licensing Division in Gettysburg, PA is given responsibility for the regulation of wireless cable. They have shown that they can handle large volumes of filings rapidly and efficiently. Since virtually all operators of wireless cable choose to operate as Non-Common Carriers, the service can be more accurately attributable to the jurisdiction of the Private Radio Bureau rather than Common Carrier. Unfortunately, there are two major drawbacks to this reorganization from the point of view of wireless operators: The Private Radio Bureau files in Gettysburg are less accessible to most attorneys and engineers than Common Carrier files in Washington. The PRB also uses rigid distance separation requirements that are inflexible in its decision-making, even when parties are cooperating among themselves.

4. The industry has also shown that without an accurate consolidated data-base or "Inventory" listing of current applications and licenses on file, speculators unknowingly contribute to the backlog of filings by filing applications for areas that are not open or for which others have already been filed. So far the Private Radio Bureau has not kept any listing of applications it has on-file nor did it when it regulated the OFS (H-group) channels, now classified as Common Carrier MDS.

5. If the PRB is given jurisdiction to regulate wireless cable channels, it will have to be more flexible to short-spacing agreements or other waivers and it should be required to keep a data-base or an inventory listing in State/City order so that operators can get a "snap shot" view of the application situation in any given area.

6. Additionally PRB will have to work closely with the Mass Media Bureau so that, unlike recent history, one Bureau does not disallow a system's operation that the other Bureau, regulating channels with almost identical properties, allows. The table of co-channel separation distances appears to offer a quick reference for engineers to check the filing-potential status in a given area, but this device should only be used along with current interference protection standards. Also there should be a separate table for adjacent-channel interference guidelines. Only the interference protection standards currently used for co-channel and adjacent channel interference allow sufficient flexibility to allow for short-spacing of wireless facilities. We believe that the best solution is the retention of Common Carrier's interference protection standards, but having them enforced by the Private Radio Bureau.

7. Mitchell agrees that settlement agreements should be barred in the future because entities have abused the process by filing multiple applications so that they can "stack-the-ballot-box". Although unstated until the lottery approaches, it is the intention of application mills to form settlement groups all-along and attain the cumulative percentage of chances to win the lottery. They in effect, rig the lottery so that it is unlikely that any single entity has much of a chance to win. Mitchell supports a flat ban on any applicant holding any kind of interest in more than one applications for the same channel(s) in the same service area.

8. Mitchell believes that opening the filing window for second systems in large MSA's and CMSA's should be done on a case by case basis. In MSA's and CMSA's where there is a fully-construct operating system, the Commission should designate a one-day filing window for additional applications to serve unserved areas within an MSA or CMSA. These "fill-in" applications should be contingent on these applicants proving non-interference to all previously filed proposed facilities. No area should be open for filing until the first lottery winners have constructed their facility and unserved areas can be carefully analyzed. We do not agree that any current applications should become invalidated forcing all parties to "start over" because of procedural problems caused by the FCC staff processing.

9. Mitchell agrees that signal boosters aka beam-benders should not have to be licensed individually. The licensing of boosters would further complicate application processing procedures causing increased confusion and delays. We also agree that the Commission should simplify the showing of qualifications to hold a license and of site-availability. Making these showings takes considerable time and money, but do not assist the potential operator in his efforts to get his business off the starting-block.

10. The NPRM does not address disturbing abuse of FCC procedures, which is creating turmoil for numerous legitimate wireless cable developers. That being a loophole in Mass Media's rules omitting regulation of leasers of excess ITFS capacity.

11. There are no prohibitive regulatory restrictions for wireless operators leasing excess capacity from ITFS systems. On the surface, this sounds like it might encourage the leasing of excess ITFS capacity, but when coupled with the restrictive rules preventing wireless operators from filing for commercial-use of vacant ITFS channels, the result is the discouragement of the incentive to assemble commercial channels and the encouragement of the strategy to initially assemble leases for ITFS channels. These newly revised incentives lead to the fragmentation of the already limited wireless channels for a given area.

For example: Assume all ITFS channels in market #1 are vacant and Wireless Entity A has won an MMDS lottery for the E group in Market No. 1. Traditionally, Entity A signs an airtime channel lease agreement with the winners of the F group MMDS lottery. At this point, strategically the ITFS channels become more valuable as the scarcity of available channels becomes greater. The value continues to increase as the wireless operator assembles the remaining available commercial channels in preparation for launching of the service to the public. Entity A decides to file for commercial use of 8 ITFS channels for which he is eligible, since he owns and/or leases at least 4 commercial wireless channels in Market No. 1. This will leave 8 vacant ITFS channels available for future ITFS use. Strategically, Entity A begins next to make contract with local educational entities about working together to file ITFS applications for the 8 still vacant ITFS channels.

12. At anytime, during this process another potentially competitive wireless cable operator, we'll call Entity B, can approach as many as (4) local schools, enticing them to lease excess capacity to Entity B. Through filing, on behalf of each school for (4) ITFS channels or a total of all 20 ITFS channels, Entity B can gain control of all excess ITFS capacity in Market #1. (Entity B's ITFS applicants can invalidate the commercial ITFS channels filed at the expense of Entity A because local schools can

demand access at any time when ITFS channels have been licensed for "commercial" use to a wireless operator). However, Entity B is not restricted from leasing all 20 ITFS channels and holding them (for ransom) from Entity A. The result is, the scarce wireless channels are then left divided or fragmented. Entity A has assembled most or all commercial channels and Entity B has leases for all ITFS channels.

13. There is not a single place in the country where there are two competing wireless cable systems, both competing with the local wireline cable franchise. And it is highly unlikely that many markets can support (2) viable wireless cable systems. Therefore financing becomes impossible for Entity A and Entity B's schools continue to ask for and receive repeated grants of modifications for extensions of time until the commercial channels of Entity A are forfeited due to lack of financing for construction. Entity B subsequently applies for the commercial channels that were formerly Entity A's and only then, does a wireless system have a chance of being constructed and becoming viable. FCC regulations have turned the advantage around against traditional wireless strategy by making it strategically fortuitous to obtain excess ITFS capacity first, then commercial channels, because extensions are routinely approved for local schools by Mass Media, but almost never approved for wireless operators in Common

Carrier. This strategic change penalizes all potential wireless operators who have spent several years assembling the commercial wireless channels.

14. In fact, the rules restricting wireless entities are all avoided by Entity B who is not the applicant, but a leaser of excess capacity from local schools. Entity B is never considered to be a wireless operator, so Entity B has an advantage, it can merely avoid regulation by using local schools as a guise to gain a toehold in markets where they have no commercial wireless channels. The unintended result of FCC policy changes which restrict legitimate wireless operators applying for commercial channels is to encourage the fragmentation of channels in all areas not already constructed. These regulatory policies encourage potential wireless operators like (Entity B) to challenge and tie-up ITFS channels with leases of excess capacity.

15. Mitchell Communications believes that the FCC should <u>retroactively</u> restrict the leasing of excess capacity only to potential wireless operators who have at least (4) commercial channels in any given market. This would level the playing field for both Entity A and Entity B. "The current difference is that one is regulated and one is not. In all too many situations Entity B through its indirect route can wait-out legitimate operators like Entity A who are regulated directly.

16. One solution to closing this apparent loophole would be to define the term "wireless operator". Wireless operators should be given rights and responsibilities that are not obtainable by the typical application mill's clients or ITFS high-jackers. Wireless operators should have a license or a lease for at least four (4) commercial channels in the core market. Secondly, a wireless operator should be transmitting at least four (4) signals which carry video programming for payments. Finally a wireless operator should have at least fifty (50) paying equivalent subscribers (the traditional Cable TV definitial of an equivalent subscribers should be used). The FCC should also consider other threshold qualifications for wireless operators to become and maintain their status as bonafide wireless operators.

17. If the FCC wants to allow potential wireless operators like Entity B to "jump someone else's train", then the lessors of excess wireless capacity should remain unrestricted. If the FCC wants to delay the development of operating viable wireless cable systems, they can allow the leasers of excess ITFS capacity to remain unrestricted. But if the FCC wants to encourage wireless cable TV development, restrictions must be retroactively applied to all leasers of excess ITFS capacity. Only entities with (4) commercial channels or a lease for (4) commercial channels should be eligible to lease excess ITFS capacity. In the future it is unlikely that any wireless operator will choose to file commercial ITFS applications since the so called high-jackers (like Entity B)

can go through schools to usurp the commercial operator's channels. To allow any other entity to enter the competition for the already scarce ITFS channels will only result in the division or fragmentation of the channels and the consequential delay of the service to the public until legitimate operators, unable to obtain financing for the commercial channels, are forced to forfeit their licenses. Many legitimate wireless operators will be unable to assemble the excess capacity of the 20 ITFS channels to go along with their commercial channels unless restriction are applied retroactively to the current unregulated leasers of excess ITFS capacity.

18. Mitchell Communications believes that the importance of this issue, the leasing of excess ITFS capacity, overwhelms other issues addressed in the NPRM. Mitchell believes that MDS regulation needs to be relocated in PRB but continue to use current Common Carrier engineering requirements rather than rigid distance specifications. We believe that once the backlog is reduced, analysis of the engineering will not be a great burden to the Commission's Staff.

Respectfully Submitted

John M. Raines, Executive V.P.
Mitchell Communications Corp.
Six Concourse Pkwy., NE / #2120
Atlanta, Georgia 30328